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Before the
Federal Communications Commission
Washington, D.C. 20554

SEP 25 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Telecommunications Services)
Inside Wiring)

Customer Premises Equipment)

In the Matter of)

Implementation of the Cable)
Television Consumer Protection)
and Competition Act of 1992)

Cable Home Wiring)

CS Docket No. 95-184

MM Docket No. 92-260

COMMENTS OF HEARTLAND WIRELESS COMMUNICATIONS, INC.

Heartland Wireless Communications, Inc. ("Heartland"), hereby submits its comments in support of the Further Notice of Proposed Rulemaking issued in the above-captioned proceeding.¹ Heartland develops, owns and operates wireless cable television systems, and is the largest such operator in the United States, with channel rights in 95 markets representing approximately 10,200,000 households. Heartland generally targets small to mid-size markets, primarily in the central United States.

¹ Further Notice of Proposed Rulemaking, CS Docket No. 95-184, MM Docket No. 92-260 (rel. August 28, 1997) ("Further Notice" or "FNPRM").

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Heartland recognizes that the current rules regarding cable inside wiring do not guarantee fair and equitable access to multiple dwelling units ("MDUs"). Heartland generally supports the Commission's approach proposed in this proceeding, which represent an important step in its larger efforts to foster competition among competitive multichannel video programming distributors ("MVPDs") and incumbent cable systems, and to promote consumer choice.

I. THE CURRENT RULES GOVERNING CABLE INSIDE WIRING STIFLE COMPETITION AND CONSUMER CHOICE IN THE VIDEO PROGRAMMING DISTRIBUTION MARKET.

Heartland supports the Commission's conclusion that its current regulations governing cable inside wiring are inadequate to promote competition and consumer choice in MDUs.² This conclusion is supported by substantial evidence on the record, described extensively by the Commission in its FNPRM, which demonstrates that uncertainties over ownership of cable wiring contribute to the tremendous competitive advantages enjoyed by incumbent cable services over competitive MVPDs in providing service to MDUs.

In particular, Heartland agrees with the Commission's conclusions that uncertainty over ownership of wiring hampers competition, and that substantial practical and physical barriers combine to make it difficult for competitive MVPDs to offer service to MDUs already wired by another service provider.³ For example, MDU property owners often object to the installation of multiple home run wires for reasons including aesthetics, space limitations and avoidance of

² FNPRM ¶¶ 25, 27.

³ Id. ¶¶ 25, 31.

disruption and inconvenience.⁴ Accordingly, the record reflects overwhelming recognition that a new approach is necessary that allows MDU owners to allow access to alternative providers in response to resident demand without necessarily requiring the installation of redundant wiring.

II. THE PROPOSED FRAMEWORK GOVERNING THE DISPOSITION OF "HOME RUN WIRING" AND "HOME WIRING" IS FAIR AND WILL FOSTER COMPETITION.

In its FNPRM, the Commission has proposed a set of procedures governing the disposition of cable wiring in MDU buildings. Heartland strongly supports these proposals, which would resolve uncertainties over ownership of existing wiring by requiring incumbent video service providers either to sell, remove or abandon their wiring within a definite time period, upon notice that the MDU owner seeks to terminate service. This new approach, by eliminating what has been a substantial barrier to entry, would help to foster competition in the video programming industry and would allow MDU owners and residents choice in program providers. As set out below, Heartland joins other parties in urging the Commission to make minor additions and clarifications in order to close loopholes that may allow incumbents to delay or avoid obligations under the proposed rules.

The proposed framework, will allow for an orderly disposition of wiring on both a building-by-building basis (where an MDU building owner decides to convert the entire building to a new video service provider) and a unit-by-unit basis (where the MDU owner seeks to permit two or more MVPDs to compete for subscribers). In either case, as soon as an MDU owner notifies the incumbent provider that it plans to terminate service in its building, or allow

⁴ See e.g. Wireless Cable Association Comments at 11, 13 (filed March 18, 1996).

individual residents to do so, the incumbent is required either to sell, remove or abandon its wire within a short time period, as specified in the FNPRM. Heartland supports the Commission's decision to apply these procedures both to "home run wiring," which runs from the demarcation point to the point at which cable wiring becomes dedicated to an individual subscriber, and to "home wiring," which runs from the demarcation point to the subscriber's television set.⁵

Heartland believes that, to ensure prompt resolution of ownership questions, incumbent cable operators must be required to announce their intention to sell, remove or abandon cable wiring within a short time frame. While generally supporting the time limits proposed in the FNPRM, Heartland believes that the time periods associated with unit-by-unit conversions are too long.⁶ Accordingly, Heartland agrees with a proposal to shorten these periods, which it believes will be advanced by ICTA.⁷ Under the rules currently proposed, incumbents would be permitted to delay the sale of wiring to competitors for up to 90 days.⁸ Such a long time lag is unnecessary and would hamper competition, as it would allow incumbents a free grace period to lock up subscribers and MDU owners in long-term agreements. ICTA's proposal would shorten the time periods involved, but would still allow incumbents a reasonable amount of time to decide how to dispose of cable wiring upon termination.

⁵ FNPRM ¶ 73.

⁶ See id. ¶¶ 35, 39.

⁷ Heartland understands that ICTA intends to propose shortening the election period applicable to unit-by-unit conversions from 60 to 15 days, at which point the incumbent would be required to abandon the wiring immediately, if it so chooses, or establish a firm price in 7 days, if it decides to sell.

⁸ FNPRM ¶ 39.

Heartland recognizes that the Commission's decision to apply these procedures only where the incumbent provider has no legally-enforceable right to maintain its cable wiring on the property represents a loophole that could be abused by incumbent cable systems.⁹ Incumbents must not be allowed to delay compliance with the election requirements proposed in the FNPRM simply by *claiming* a legal right to retain cable wiring in an MDU against the will of the building owner. The Commission has acknowledged that incumbents have "aggressively" employed litigation tactics, claiming property interests in cable wiring, with the effect of "chilling the competitive environment."¹⁰ Accordingly, Heartland agrees with the Wireless Cable Association ("WCA") that the time periods specified in the FNPRM should not be tolled pending the resolution of such claims. This would not infringe upon an incumbent's ability to assert its legal right, but would simply require it to demonstrate promptly that it actually possesses an enforceable legal right. If tolling is permitted, however, the effectiveness of these rules would be substantially compromised, and incumbents would be able to foil the carefully-crafted accelerated time schedules which are necessary to foster competition.

Heartland also supports WCA's proposal that the Commission impose steep fines on cable operators that abuse the process proposed in the FNPRM by making false or misleading elections. An incumbent, when informed that an MDU owner intends to terminate service, would have a tremendous incentive to announce that it intends to remove its wire -- thereby causing the MDU owner to rethink its decision to switch providers and forcing potential competitors to contemplate rewiring (or to actually rewire) the entire building. Without fines,

⁹ See id. ¶ 34.

¹⁰ Id. ¶ 31.

however, the incumbent would have little incentive to incur the cost of actually removing its wire. The Commission has expressed concern over the possibility of such gaming tactics, acknowledging that "such conduct could put the alternative service provider to the unnecessary burden and expense of installing a second set of home run wires when the incumbent has no intention of removing the existing wire."¹¹ Heartland further agrees with WCA that the maximum possible fines must be high enough to sufficiently discourage wasteful and anticompetitive gamesmanship.

Where an incumbent elects to sell the cable wiring, the Commission expressed a preference to allow parties to negotiate the price of the wiring, but has requested comment on whether it should establish additional price rules. Heartland believes that market forces would generally provide adequate incentives for the parties to reach a reasonable price without artificial price guidance from the Commission. Furthermore, pricing formulas or default prices, even to the extent they merely constitute a general guide, necessarily affect parties' negotiations. Heartland recognizes that the Commission's approach -- to require abandonment or removal in the event the parties are unable to agree on a price -- would give incumbents substantial incentive to negotiate a fair price.

Finally, Heartland supports the Commission's proposal to require relocation of the demarcation point, in the event such a point is "physically inaccessible," to a point where the wiring first becomes physically accessible.¹² Heartland urges the Commission to clarify that such a relocation should be permissible only to the extent that it moves the demarcation point

¹¹ FNPRM ¶ 36.

¹² FNPRM ¶ 84.

towards the junction box and away from the MDU unit. A “physically accessible” point even closer to, or inside, the dwelling unit should not be seen as an acceptable solution.

III. ALTERNATIVES TO THE PROPOSED PROCEDURAL FRAMEWORK.

Heartland strongly urges the Commission not to adopt a rule requiring video service providers to transfer ownership, upon installation, of all new cable wiring installed under contracts entered into after the effective date of the new rules. Heartland submits that the Commission lacks statutory authority to intrude in this manner and dictate the ownership rights arising from private contractual agreements between competitive MVPDs and MDU building owners. In addition, imposing this ownership arrangement on all future agreements between MVPDs and MDUs is inconsistent with the procompetitive, deregulatory nature of the Telecommunications Act.¹³ Following from the expressly deregulatory purpose of the 1996 Act, the Commission should not establish new regulations which impair the development of free and effective competition in the video service marketplace. Moreover, this rule would disproportionately impact competitive MVPDs, as it would not disturb existing ownership arrangements that predate these rules. Finally, this rule is simply not necessary to ensure competition.

¹³ See, e.g., H.R. Conf. Rep. No. 104-548, at 1 (1996) (the purpose of the 1996 Act is “to provide for a pro-competitive, de-regulatory, national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications . . . by opening all telecommunications markets to competition”).

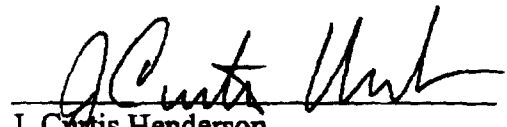
IV. CONCLUSION

Heartland broadly supports the Commission's approach to recrafting the cable wiring rules to foster competition among MVPDs and increase consumer choice. The FNPRM presents a fair and reasonable framework governing the disposition of incumbents' cable wiring in the event an MDU owner seeks to terminate service and allow competitors access to the building. As set out above, Heartland supports a number of minor changes and clarifications in order to ensure that these rules do, in fact, allow for competitors to negotiate access to incumbents' cable wiring on an equitable and timely basis.

Respectfully submitted,

Heartland Wireless Communications, Inc.

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